SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 335 and 463

THE HANOVER SHOE, INC.,
Petitioner,
v.
UNITED SHOE MACHINERY CORPORATION

UNITED SHOE MACHINERY CORPORATION,
Petitioner,
v.
THE HANOVER SHOE, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING OF UNITED SHOE MACHINERY CORPORATION (RESPONDENT IN NO. 335, PETITIONER IN NO. 463)

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Rehearing is hereby sought pursuant to Rule 58 of the Court's decision rendered June 17 1968 following certiorari on cross-petitions granted in 389 US 81. This petition seeks further consideration by the Court of important questions of antitrust law raised in a treble damage suit by a lessee of shoe machinery against United Shoe Machinery Corporation on the basis of the decree in 110 F. Supp. 295, aff'd 347 US 521. The Court's decision, Stewart J. dissenting and Marshall J. not participating, proceeds on the basis of what are believed to be fundamental misapprehensions of fact and law which have resulted in grave injustice.

Without waiver of contentions heretofore made, petitioner respectfully directs the Court's attention to the following as principal grounds for rehearing.

1. Expansion by the majority opinion of Clayton Act § 5(a) beyond the underlying antitrust decree, through resort to the findings for material not contained in the decree, violates the Congressional purpose with respect to the estoppel thereby created.

Fundamental to this Court's affirmance of the judgment below is the construction given to the 1953 decree of Wyzanski J., 110 F. Supp. 295. Unless that judgment evidenced the illegality of the lease-only practice, then the majority opinion recognizes (p. 2),

> ". . . Hanover, having offered no other convincing evidence of illegality, should not have recovered at all."

Hanover prevailed below upon a broad construction of the decree in the prior Government case as extending to the lease-only practice even though the decree does not mention such practice, either generally or as an antitrust violation. The majority in this Court (Stewart J. dissenting) has approved such broad construction with the statement that the Court is not "limited to the decree in determining the extent of estoppel resulting from the judgment in the Government's case" (p. 3). This conclusion, which is indispensable to recovery by Hanover, is submitted to be grave error violative of the intent of Congress.

Clayton Act § 5 is the sole authority for Hanover's attempted estoppel by judgment. The statutory language is explicit in confining such estoppel to

> "A final *judgment or decree* . . . rendered . . . in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws *to the effect that a defendant has violated said laws* . . ." (Emphasis supplied)

Hence in measuring the statutory estoppel the Court is confined to the actual language of the "judgment or decree". Where that judgment is entered without particularization upon a general verdict in a criminal case and where the ensuing treble damage action itself is before a jury, then necessarily the meaning and extent of the judgment of conviction are to be explained by the treble damage court to the treble damage jury. This is one of the incidents of jury trial necessarily taken into account by Congress in Clayton Act § 5. As stated by this Court in *Emich Motors Corp.* v. *General Motors Corp.* 340 US 558 at 571,

> "What issues were decided by the former Government litigation is, of course, a question of law as to which the court must instruct the jury. It is the task of the trial judge to make clear to the jury the issues that were determined against the defendant in the prior suit, and *to limit to those issues the effect of that judgment as evidence in the present action.*" (Emphasis supplied)

The majority opinion cites *Emich* without making the essential distinction between the requirements of the double jury trial there involved, and the unique exactitude of a decree in equity. The Congressional expression "final judgment or decree" is a term of art, the judgment being the medium through which the court speaks with final authority. With respect to a proceeding in equity Congress could not have intended by employing the term to authorize excursions outside the judgment or decree so as to amplify or extend its sweep in the estoppel on which a subsequent damage action would be erected. For it is clear from the language of § 5 that the statutory force is limited, not only to the judgment or decree of the equity court, but to that portion which adjudicates "that a defendant has violated said [antitrust] laws".

Both parts of the Congressional expression, it is submitted, restrict the treble damage court both to the decree pure and simple, without circumscribing explanatory matter such as findings; and to the effect of the decree in determining a violation by the defendant of the antitrust laws. Both parts of this Congressional purpose are satisfied by the exemplary precision with which the antitrust court, Wyzanski D. J. in 110 F. Supp. 295, pin-pointed in his judgment the violations that he found, setting off to one side the explanatory findings which constitute no part of the "final judgment or decree" that Congress established as the only base of the statutory estoppel. For instance, the language of the majority opinion as to the reasoning of the antitrust court in respect of the lease-only policy, however plausible it might seem, only emphasizes the distinction between decree and findings. The majority argue from certain language of Wyzanski J. about the necessity of alternative sales in the future, that the lease-only policy must, in the mind of the antitrust court, "also have made a substantial contribution to United's monopolization of the market during the period prior to the entry of the judgment" (p. 4 fn. 3). But controlling significance surely should be attached to the fact that, whatever the author of the decree thought on this point, *he did not insert such a determination in the decree* which Congress made the only vehicle for Hanover's estoppel.

Both the majority and the minority opinions in this Court recognize that the instruments of monopolization are carefully defined in the antitrust decree par. 4 as certain lease terms and nothing else. But the majority opinion, misapplying (as we respectfully submit) the *Emich* rule applicable only to a criminal conviction, deliberately travels outside the permitted limits of the decree in order to add to the antitrust condemnation a determination as to United's

lease-only policy which the antitrust court did not put into its decree. We submit that the omission of that determination from the antitrust decree was deliberate, and that the injection thereof into the decree for the purpose of enlarging the estoppel was, on the part of this Court, the kind of legislative action which Congress alone is competent to make.

If excursions are to be made outside the antitrust decree for a determination of its purpose and effect, this record demonstrates the real intention of the antitrust court with respect to the lease-only point. As the dissenting opinion notes, Wyzanski J. made his own views clear to Government counsel upon United's application for a construction of his decree:

> "Now that you here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided?" (opinion of Stewart J. p. 4 fn. 2; see R. 141-3)

If the Court were to go outside the decree proper for the intention and holding of the antitrust court, the application which United made before judgment in the treble damage court for that purpose should be granted and taken into account. This Court has approved the practice of construction of the underlying Government decree by the original antitrust court. *United States Gypsum Co.* v. *National Gypsum Co.* 352 US 457, 463-4. In that instance this Court said the issues presented in a private antitrust case were "issues peculiarly within the province of the antitrust court, whose determination would avoid . . . possibly conflicting decisions . . ." Again, if the Court is to travel outside the decree proper, controlling weight should in our

opinion be given to that portion of the findings in which the antitrust court said (110 F. Supp. at 323, 340):

> "Moreover the testimony in this case indicates virtually no shoe manufacturers who are dissatisfied with the present system.
>
> . . . . . .
>
> In supplying its complicated machines to shoe manufacturers, United, like its more important American competitors, has followed the practice of never selling, but only leasing. . . . So far as this record indicates, there is virtually no expressed dissatisfaction from consumers respecting that system; and Compo, United's principal competitor, endorses and uses it."

This language in the findings is a further demonstration that the antitrust court did not intend by its decree to adjudicate the lease-only policy as an antitrust violation so as to create the estoppel which Hanover requires for recovery. From the very reasoning which the majority adduces in dredging out of the 1953 findings a determination concerning lease-only which is not found in the decree, it would seem perfectly clear that this point was not "necessarily decided" or "distinctly determined" in the Government suit as the authorities require.

2. The majority decision erroneously deprives petitioner of the settled law of this Court which approved its lease-only policy until by this Court's affirmance (347 US 521) of the 1953 decree the rule was changed.

As pointed out in the opinion, pp. 17-18, three prior decisions in this Court dealt with United's leasing practices in one way or another. Basic to the proper determination of Hanover's claim to have been injured in the 1939-55 period by United's lease-only practice, is the 1918 decision

of this Court sustaining the validity of that practice. *United States* v. *United Shoe Machinery Co. of New Jersey* 247 US 32. Wyzanski J. in entering a decree of monopolization thought that this and other cases had approved United's procedure, 110 F. Supp. at 341, 343, although he saw in the *Aluminum* case a "reversal of trend" which led him in 1953 to find United monopolizing in violation of § 2 and, for the future beginning in 1955, to eliminate by decree the lease-only practice.

The majority opinion recognizes that the Court had affirmed dismissal of a bill which charged that the machinery leases and license agreements violated §§ 1 and 2 of the Sherman Act (p. 18). The majority also seems to recognize the full sweep of the holding.[1] Yet for some reason the majority fails to give the 1918 decision its full and legitimate effect. We respectfully submit that this conclusion is clearly erroneous on two grounds.

One part of the decision on this point seems to be that the 1918 case did not adjudicate the lease-only practice.

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[1] "There is no question but that the leases as they were then constituted were held unassailable under § 1; the reasons for this ruling are not clear. As for the § 2 charge, we cannot read the opinion as specifying what course of conduct would amount to monopolization under § 2 if engaged in by a concern with monopoly power. At most the holding was that the leases themselves did not prove a § 2 charge—did not themselves prove monopoly power as well as monopolization. But the issue in the case before us now is not whether United's leasing system proves monopoly power but whether, once monopoly power is shown, leasing the way United leased sufficiently shows an intent to exercise that power. There is little, if anything, in the 1918 opinion which is illuminating on this issue. Indeed, it may fairly be read as holding that United did not have monopoly power over the market at all, for in rejecting the claim that United's practice of leasing was illegal when used by a corporation dominant in the market, the Court said:

> 'This, however, is assertion and relies for its foundation upon the assumption of an illegal dominance by the United Company that has been found not to exist. This element, therefore, must be put to one side and the leases regarded in and of themselves and by the incentives that induced their execution . . .' 247 U.S., at 60."

The Court says, after paraphrasing the decision as to both § 1 and § 2,

> "But the issue in the case before us now is not whether United's leasing system proves monopoly power but whether, once monopoly power is shown, leasing the way United leased sufficiently shows an intent to exercise that power."

This seems to imply that the 1918 case did not deal with "leasing the way United leased", i.e. with the exclusive leasing system. But the fact is obviously to the contrary. The leases before the Court in 1918 were part of a lease-only system, as clearly pointed out by the District Court in that case (222 Fed. at 352):

> "On the whole, as the case developed, no objection was persisted in by the United States to the fact that the policy of the Shoe Machinery Company was to lease its machines, instead of selling them. It was plain that this policy was not injurious in a large sense."

This means that the Supreme Court had in view a lease-only system when it held "The evidence disproves" the contention that the leases "preclude the competition of the second [machinery makers] with the defendants" (247 US at 63).

Again it is evident that this Court in the 1918 case understood the lease-only system to be under attack when it quoted the Government's charge that

> "it is, however, in their combined effect as a system of leasing, used and insisted upon by a corporation dominant in its field that the full extent of their illegality is to be perceived." 247 US at 60

The second ground suggested by the Court for rejecting the 1918 decision as a justificatory precedent is that the

subsequent Clayton Act case, 258 US 451 (1922), limited the 1918 holding. The Court refers (p. 19) to the fact that at p. 460 of 258 US the leases attacked in the 1918 case "were sustained as valid and binding agreements within the rights of holders of patents". This language however was employed in the 1922 case, not to limit the former holding, but to show that the cause of action in the two cases was "not the same". The 1922 decision points out that the Clayton Act dealt with machinery, whether patented or unpatented, and that the restrictive clauses held valid under the Sherman Act in 1918 could not survive the different tests of the Clayton Act (258 US at 460-2).

Hence the language in the majority opinion from 258 US at 460 could not have been intended to subtract from the full force of the prior holding that the lease-only policy complied with the Sherman Act as that Act was construed by this Court in 1918 and (as regards United's leases) up to 1954. If the phrase "authoritative gloss" (opinion p. 20) with respect to the 1922 opinion is intended to imply that it somehow overruled the 1918 opinion as regards the lease-only policy, it is respectfully submitted that the holding is error which justifies rehearing in view of its critical importance with respect to the issue here.

The Court in the 1922 case, 258 US at 460, properly pointed out that isolated passages in the 1918 opinion could not be seized upon to determine "the effect of the former judgment as an estoppel". It cited *Vicksburg* v. *Henson* 231 US 259, 269, where it was said:

> "It is well settled, however, that a decree is to be construed with reference to the issues it was meant to decide. [Citations]"

Construed with reference to the issues it was meant to decide, the 1918 decision of this Court validated with a fullness which we submit is not fairly open to dispute

the lease-only practice which this Court now holds (opinion pp. 3-5 and appendix) the 1953 decree condemned. For the decree affirmed by this Court in 1918 dismissed the bill, as the Court recognizes (opinion p. 18). The bill dismissed contained a full description of the leasing system as the sole method of distribution to the exclusion of sales (222 Fed. at 351-3). The opinions of the three-judge court are a complete vindication under the Sherman Act as construed by them of the lease-only system. See Putnam J. at p. 361 of 222 Fed.; Dodge J. at pp. 370-1 and 391; Brown J. at pp. 401 and 414-5. These judges clearly understood the issue to be exactly the same issue as was here given a different determination in 1953-4. Thus Brown J. said, 222 Fed. at 408:

> "It is most important to observe that the petition presented the lease system as a part merely of a general plan of monopoly. The main brief of the United States so treated it."

Hence the affirmance by this Court in 1918 of the conclusion so clearly reached by the three-judge court as to the validity of the leases and the lease-only system under the Sherman Act, was a valid and binding determination of the propriety of United's leasing system until the new version was adopted by Wyzanski J. in 1953 with the subsequent sanction of this Court.[2]

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[2]Illustrating how fully the 1918 Court went into practices later condemned is the approval in 1915 of the full-capacity clause (222 Fed. at 388, 404) that Wyzanski J. criticized in 1953 (110 F. Supp. at 340). We are surprised to find the explicit holdings of the Court in the *Steel* case and the *International Harvester* case with respect to the necessity of overt and predatory practices as an element of monopolization, now characterized by this Court as "dicta" (opinion p. 16 fn. 13). As we read the language both of McKenna J. in 251 US at 451 and of Sanford J. in 274 US at 708, it was in each instance essential to the outcome of the case and hence could not be properly discarded as dictum.

We of course do not contest this Court's *power* to overrule in 1954 the 1918 decision by affirming in 347 US 521 the 1953 decree (110 F. Supp. 295). What we do contest, and what we respectfully suggest the rule of law does not permit, is the conversion of such overruling decision into a retroactive violation by defendant of the Sherman Act in the prior period 1918-54 in which defendant justly considered that it was complying with that Act. Such a result transcends the individual case and discourages law observance.

3. The majority opinion rests on the erroneous assumption that petitioner's lease charges were illegally high, contrary to the findings below.

The District Court found that the lease charges were reasonable in amount (R. 100, 57). Sheridan J. said that Hanover's claim with respect to purchase

> "... does not necessarily imply excessive returns to United." (R. 55)

The Court of Appeals did not disturb this finding.[3]

The majority opinion here seems to proceed under the misapprehension that the lease charges in themselves were illegally high. Thus it refers to the assumption that Hanover "paid illegally high prices for machinery leased from United" (p. 6 fn. 6), to "the excessive rentals" (*ibid.*), to the price paid by a hypothetical buyer as being "illegally high" (p. 7), to the language of the Court in *Thomsen* v. *Cayser* about "more than a reasonable rate" (p. 8 fn. 7), to the result which would have been reached in the *Keogh* case

[3]Cf. the unanimous determinations in the lower Federal courts concerning the legality of United's leases. Wyzanski J. in 110 F. Supp. at 344, 349; Thomsen C. J. in *Muskin Shoe Co.* v. *United Shoe Machinery Corp.* 167 F. Supp. 106, 111 (D. Md. 1958); Hartigan Cir. J. in *International Shoe Machine Corp.* v. *United Shoe Machinery Corp.* 315 F.2d 449, 458 (CA 1 1963), cert. den. 375 US 820.

if the rate had been "unreasonably high" (p. 9 fn. 8), and to the alternative situation where plaintiff can "prove that he has been charged an illegally high price" (p. 10 fn. 8 continued).

This language suggests that the basic reasoning of the Court proceeded on misconceptions of fact and law. There was nothing "illegal" about the lease charges which Hanover paid with entire willingness (so far as appears), without protest, and with great financial advantage in the whole of the damage period 1939-55. Nor was there anything "illegally high" about them. The mere fact that a putative purchase price *could be figured out* at a later date which would be less than the aggregate of the lease payments over the 16 years 1939-55, does not suggest either illegality or excessiveness in the lease charges themselves. Five dollars paid today cannot fairly be compared with six dollars paid over five years as an indication of a one dollar overcharge.

Since conceptions of illegality and excessiveness in the charges paid by Hanover permeate the majority opinion and deflect its reasoning, we request that rehearing be granted to correct the resultant error.

4. Grave injustice is done to petitioner by reversing the Court of Appeals' determination that the tax benefits of the leasing system are essential to just and fair comparison of leasing cost with purchase cost.

The evidence below showed that the availability of Hanover's annual lease payments as current business expenses for income tax purposes was a financial advantage which reduced the cost of leasing as compared with purchase. Hanover's expert R. M. Cyert, said on direct examination that he endorsed

> ". . . the notion of introducing taxes on making a decision on preparing data for management to make

> a decision as to whether they should purchase or not." (R. 547)

Hence the Court of Appeals was correct in reversing the District Court on this point:

> "What is involved here is not the tax on Hanover's recovery but rather the tax elements which would bear on Hanover's choice of purchasing rather than leasing the machinery it required." (R. 214, 377 F.2d at 792)

To ignore the entry of taxes into the contemporary year-by-year business calculation would be, the Court of Appeals thought, "a distortion of reality" (R. 215). Even more, to eliminate this element in the comparison of lease cost vs. purchase cost so as to create the appearance of "damage" contrary to fact, would be flagrantly wrong. It would be to fasten on defendant a court-created "injury" and "damage".

The majority opinion seems, with great respect, to exhibit misunderstanding of what the Court of Appeals did. It says (p. 21):

> "The Court of Appeals *evidently felt* that since only after-tax profits can be reinvested or distributed to shareholders, Hanover was damaged only to the extent of the after-tax profits that it failed to receive." (Emphasis supplied)

This would appear to be a wholly mistaken reading of the Court of Appeals' decision. Nothing in that decision justifies the analysis of its reasoning as directed to *after-tax profits* or their investment or distribution. We are not concerned with what it "evidently felt". There is nothing in the Court of Appeals' opinion which talks about the extent of the after-tax profits that Hanover failed to

receive. On the contrary the theory and language of that court are perfectly clear. It points out the injustice of striking from the purchase vs. leasing equation the substantial element of tax benefit which is essential to the equation and which (as everyone knows) motivates the current decisions of Hanover and other businessmen.[4]

The majority opinion acknowledges that

> "The view of the Court of Appeals is sound in theory . . ." (p. 21).

But the necessary effect of this sound theory in diminishing the damages claimed by Hanover is side-tracked by the Court's discussion of how the Internal Revenue Service treats recovery for tortious deprivation of profits. This is not at all the question before the Court. The question was not how to tax tortious deprivation of profits, but *whether there was any deprivation at all,* tortious or not. In order to reach that question and determine it correctly it was indispensable to take into account the annual tax advantage to Hanover of the leasing system which it would not have enjoyed if it had bought the machines.

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[4]Without quoting in full the whole of the two paragraphs of the Court of Appeals on this point at R. 214-5, we call attention to such language as: "A business of any size necessarily must give consideration to the tax elements inherent in the two alternatives . . ."; in determining whether Hanover would have purchased it is "significant . . . to evaluate the respective tax consequences of purchase and of lease"; ". . . these tax consequences are so inherently a part of the choice which would be made . . ."; and the question is not one of subsequent tax effect on damages inflicted but rather "the choice of one over another course of action in both of which the tax impact necessarily was a matter of contemporaneous consideration and significance".

5. The findings below as to likelihood of purchase by Hanover in the damage period are too speculative in the absence of explicit demand, to support a judgment penal in character for failure to sell.

The Court says that both courts below "found . . . that Hanover, had it been given the opportunity, would have bought rather than leased the machines offered by United", and says that this finding "is supported by the evidence" (p. 22 fn. 16).

We submit that the Court has here misapprehended both the findings and the evidence. The only finding is a single statement of the District Court:

> "Hanover need not show that in any and all cases it would have purchased, but that it *likely* would have purchased the machines." (R. 66; emphasis supplied)

The weightiest aspects of the evidence as summarized by the District Court at R. 66-8 negative any probability of purchase in the pre-1955 period. These are the voluntary lease by Hanover of 136 United optional terms machines for which Hanover voluntarily paid a total of $64,700 rental (R. 67-8); the flat declaration of Hanover's President that he had no objection to the leasing system (R. 335, 341); and Hanover's policy not to buy machines which were obsolescent (R. 311, 320, 332-3).

The speculative nature of the ultimate finding "likely would have purchased", turning Hanover's after-thought into a windfall, points up the necessity of an explicit prior demand in order to prevent injustice. Admittedly no demand was made in this case (R. 66). United was left in the belief that Hanover was satisfied, like the hundreds of other customers, with its position as lessee. Indeed Han-

over's President so stated (R. 335, 341). Hanover counsel said in oral argument at the bar of this Court:

> "We are not suing on the basis of a refusal to sell which is the way you have to get back to 1912."

Hence we submit it was error, leading to a grave miscarriage of justice, to permit recovery herein without prior demand, explicit and unmistakable, which would not only express the supposed purchase policy but also identify the particular machines as to which Hanover would assume the burden and risk of ownership. This requirement, so obvious in the interest of simple fairness, Hanover has been permitted to avoid through the fiction of transferring its United machines from a lease to a purchase basis. Yet the entire body of decisional law has required express demand as a condition for recovery of treble damages.[5]

While the majority opinion refers, as authority for dispensing with explicit demand "in the circumstances of this case", to *Continental Ore Co.* v. *Union Carbide & Carbon Co.* 370 US 690, 699, surely a material difference between the cases is that in *Continental Ore* this Court pointed out that plaintiffs had made "repeated approaches" in the effort to buy from defendants (370 US at 700). By contrast with the case at bar where admittedly no demand existed, plaintiffs in that case claimed to have made many demands.[6]

The vital importance of prior demand in this kind of case is again instanced by the Court's emphasis in *Perma Life Mufflers Inc.* v. *International Parts Corp.*, October Term 1967 No. 733, where Black J. noted (p. 3):

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[5]Our brief dated November 22 1967 in No. 463 at p. 57 cites the nine cases in the Courts of Appeal of seven circuits.

[6]See petitioners' opening brief pp. 59, 101-5.

> "Petitioners alleged that they had often requested Midas to eliminate these restrictions but that Midas had refused . . ."

The absence in the present case of this vital prerequisite to the imposition of the penal sanction of treble damages should again, we submit, move this Court to grant the rehearing requested.

Conclusion

The foregoing short submission demonstrates, we urge, the propriety and necessity of a rehearing to correct grave injustice. The wrong inflicted by the judgment below extends beyond the particular case, because here we have United's compliance with the antitrust law as authoritatively adjudicated in its situation punished by a treble damage clause reserved by Congress for a clear violation. So anomalous a result brings into question the whole scheme of the antitrust law.

Respectfully submitted,

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CERTIFICATE UNDER RULE 58

It is certified by the undersigned counsel, a member of the bar of this Court who briefed and argued the cause in Nos. 335 and 463, that the foregoing petition for rehearing of the determination therein is presented in good faith and not for delay.

RALPH M. CARSON

July 9 1968